

FACT SHEET

Proposed NPDES General Permit for Egg Production Operations (EPOs) in New Mexico, Oklahoma, and on Indian Lands in New Mexico and Oklahoma (NMG 800000 and OKG 800000)

SUMMARY: EPA Region 6 is proposing to issue General NPDES Permit Nos. NMG 800000 and OKG 800000 regulating discharges, or potential discharges, of process wastewater, rainfall or snowmelt runoff from the animal confinement or storage and handling areas, and runoff of manure and process wastewater from land application areas under the operational control of the permittee. The animal type covered by this general permit is laying hens.

ADDRESSES: Comments on this proposed permit should be sent to the Regional Administrator, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733. For further information, contact Ms. Diane Smith, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, telephone (214) 665-2145. The proposed general permit and this Fact Sheet can be found on the Internet at <http://www.epa.gov/earth1r6/6wq/6wq.htm>.

Supplementary information in this Fact Sheet is organized as follows:

- I. Legal Basis
- II. Background
 - A. Project XL
 - B. United Egg Producers XL Project
 - C. National Technology Guidelines
- III. Permit Coverage
- IV. Rationale for Permit Requirements
- V. Other Legal Requirements

I. Legal Basis

Section 301(a) of the Clean Water Act (CWA), 33 U.S.C. 1311(a), makes it unlawful to discharge pollutants to waters of the United States in the absence of authorizing permits. CWA section 402, 33 U.S.C. 1342, authorizes EPA to issue National Discharge Elimination System (NPDES) permits allowing discharges, provided the discharges will meet certain requirements, including CWA sections 301, 304, and 401, 33 U.S.C. 1331, 1314 and 1341. Those statutory provisions state that NPDES permits must include effluent limitations requiring authorized discharges to: (1) meet standards reflecting levels of technological capability, (2) comply with EPA-approved state water quality standards and (3) comply with other state requirements adopted under authority retained by states under CWA section 510, 33 U.S.C. 1370.

With regard to conventional pollutants (i.e., pH, BOD, oil and grease, TSS and fecal coliform),

CWA section 301(b)(1)(E), 33 U.S.C.1311(b)(1)(E), requires effluent limitations based on “best conventional pollution control technology” (BCT). With regard to nonconventional and toxic pollutants, CWA section 301(b)(2)(A), (C), and (D), 33 U.S.C.1331(b)(2)(A), (C) and (D) require effluent limitations based on "best available pollution control technology economically achievable" (BAT), a standard which generally represents the best performing existing technology in an industrial category or subcategory. BAT and BCT effluent limitations may never be less stringent than corresponding effluent limitations based on best practicable control technology (BPT), a standard applicable to similar discharges prior to March 31, 1989 under CWA 301(b)(1)(A), 1331U.S.C.(b)(1)(A).

Section 306, 33 U.S.C.1316, of the CWA authorizes the Administrator to propose and publish regulations establishing Federal standards of performance for New Sources within a category. These standards of performance are defined as standards for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants. Section 306(d), 33 U.S.C.1316(d), and EPA regulations at 40 CFR 122.29 allow New Sources which meet applicable promulgated New Source Performance Standards before the commencement of discharge to not be subject to any more stringent technology-based standards under section 301(b)(2) of CWA, 33 U.S.C.1311(b)(2) for the soonest ending of the following periods: ten years from the date that construction is completed; or the period of depreciation or amortization of the facility for the purposes of section 167 or 169 (or both) of the Internal Revenue Code of 1954.

Frequently, EPA adopts nationally applicable guidelines identifying the BPT, BCT and BAT standards to which specific industrial categories and subcategories are subject. Until such guidelines are published, however, CWA section 402(a)(1) requires that EPA determine appropriate BCT and BAT effluent limitations in its NPDES permitting actions on the basis of its best professional judgment.

The Agency may issue "general permits" applicable to a class of similar dischargers within a discreet geographical area. See *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977) and 40 CFR 122.28. Issuance of such permits is not controlled by the procedural rules EPA uses for individual permits, but is instead subject to section 4 of the Administrative Procedure Act (APA), 5 U.S.C. 553, as supplemented by EPA regulations; e.g., 40 CFR 124.58. EPA must, however, comply with the substantive requirements of the CWA without regard to whether it is issuing an individual or general NPDES permit.

In addition to effluent limitations, NPDES permits may require implementation of “best management practices” (BMPs). NPDES permits may include BMPs to control toxic pollutants in accordance with CWA 304(e), when numeric effluent limitations are infeasible and/or when reasonably necessary to assure compliance with effluent limitations or standards or to carry out the purpose and intent of CWS. See 40 CFR 122.44(k).

II. Background

A. Project XL

Project XL, which stands for “eXcellence and Leadership”, is a national initiative that tests innovative ways of achieving better and more cost-effective public health and environmental protection. The information and lessons learned from Project XL are being used to assist EPA in redesigning its current regulatory and policy-setting approaches. Project XL encourages testing of cleaner, cheaper, and smarter ways to attain environmental results superior to those achieved under current regulations and policies, in conjunction with greater accountability to stakeholders. It is vital that each project tests new ideas with the potential for wide application and broad environmental benefits.

B. United Egg Producers XL Project

The United Egg Producers (UEP), a farmer cooperative that represents egg producers nationwide, has entered into an XL project agreement with EPA to provide a comprehensive program to bring egg-producing facilities under NPDES permits faster, and help participating egg-producing facilities achieve superior environmental performance by implementing an environmental management system (EMS). This XL project allows these facilities to obtain permit coverage under a less costly and complex mechanism; i.e., a general permit and an EMS-based program tailored to the needs of the egg-laying industry, as an incentive for the industry’s large producers to maintain environmentally superior facilities and practices. Facilities that do not continue to comply with their general permit or do not adequately implement their EMS could be required to obtain individual NPDES permits. This project was developed by a workgroup comprised of EPA, UEP members, several states, non-governmental organizations, and U.S. Department of Agriculture. The XL project final agreement was signed on October 25, 2000.

The XL project agreement requires participating facilities not only to comply with the terms of an NPDES general permit, but also to implement a multi-media EMS that controls a range of significant environmental impacts including those not subject to regulation under the Clean Water Act, such as odor and pest control. The project also includes a third-party auditing component and on-farm management practices most likely to result in superior environmental performance. Each facility’s EMS will be required to pass the independent third-party audit before the facility can apply for coverage under the general permit. Information on audit results will be provided to the appropriate regulatory authorities and will be available to local stakeholders. Ongoing audits will be conducted to ensure continuing implementation of the EMS, and audit results will be available to the public.

C. National Technology Guidelines

National guidelines establishing Best Available Technology (BAT) and New Source Performance Standards have been promulgated for certain sizes and types of facilities in the

Feedlots Point Source Category and are codified at 40 CFR 412. For laying hen operations, these guidelines apply to facilities having the capacity for 100,000 or more laying hens when the facility has unlimited continuous flow watering systems, and facilities having the capacity for 30,000 or more laying hens when the facility has liquid manure handling systems. The facilities potentially eligible to participate in this XL project have neither unlimited continuous flow watering systems nor liquid manure handling systems. These facilities have dry manure storage and handling systems and do not use unlimited continuous flow watering systems. There are, therefore, no guidelines establishing BAT and New Source Performance Standards for the facilities potentially eligible for participation in this XL project, and these facilities do not fit the definition of new source in 40 CFR 122.2.

III. Permit Coverage

A. Egg Producing Operations Eligible for Coverage

This general permit is available for any egg producing operation (EPO) located in New Mexico, Oklahoma, and on Indian lands in New Mexico and Oklahoma that has agreed to participate in the United Egg Producers XL Project and has qualified for permit coverage. The permit covers the animal confinement areas, storage facilities and unloading/handling areas of manure or egg wash wastewater, and land application activities under the operational control of the EPO.

Discharges regulated by the permit include:

Contaminated runoff from stock piled manure and feed;

Overflow from manure storage facilities, including secondary containment;

Discharges via ground water that has a direct hydrologic connection to surface waters of the U.S.;

Discharges associated with land application of manure and/or wastewater activities under the control of the EPO operator;

Manure and/or wastewater discharges from retention ponds, manure storage facilities, or lagoons, including secondary containment;

Discharges of manure and/or wastewater due to pipe breakage or equipment failure;

Leaks or seepage from retention ponds, manure storage facilities, lagoons to ground water that has a direct hydrologic connection to surface waters of the U.S.;

Discharge of pollutants from dead bird and nonedible egg handling and storage; and

Spills or leakage from the poultry houses or the pit under the poultry houses.

B. Requirements for Obtaining Coverage

Owners/operators of EPOs seeking to be covered by the permit general permit must submit: (1) a notice of intent (NOI) to be covered by this permit; (2) evidence that the EPO has developed and implemented an EMS consistent with the guidelines set forth below in the permit; (3) the results of a successful audit conducted by an independent third party for the purpose of applying for this permit; and (4) evidence that the EPO: has placed a notice in the local newspaper that indicates the EPO has passed the audit and intends to submit the NOI, has sent the noticed directly to local stakeholders, and has established a point of contact at the facility for public inquiries.

Owners/operators of new EPOs must submit an NOI, have a complete comprehensive nutrient management plan (CNMP) and an EMS at least 180 days prior to commencement of operation. This 180 day requirement is contained in Appendix B of the XL Project final Project Agreement, as discussed in Part IV of this fact sheet.

C. Egg Producing Operations Not Eligible for Coverage

The following EPOs are not eligible for coverage under this NPDES general permit:

1. EPOs that have failed an audit by an independent third party or been notified by EPA to apply for an individual NPDES permit in accordance with Part I.F (below) of this permit.
2. EPOs that have been notified by EPA that they are ineligible for coverage because of a past history of non-compliance.
3. New and/or significantly expanding EPOs that apply manure and/or wastewater to lands that are adjacent to water bodies that are listed under the Clean Water Act, section 303(d), as impaired due to inadequate oxygen, excessive nutrients, suspended solids, turbidity and/or pathogens and are notified by the EPA to apply for an individual NPDES permit. A significantly expanding EPO means one which meets the criteria of 122.29(b)(1)(i), (ii) and/or (iii); although, such facilities do not meet the definition of a new source in 40 CFR 122.2, as discussed in Part II.C, above.
4. EPOs which have liquid manure handling systems and/or unlimited continuous flow watering systems.
5. Facilities which adversely affect properties listed or eligible for listing in the National Register of Historical Places.

IV. Rationale for Permit Requirements

As discussed in Part II.C of this fact sheet, the BAT and New Source Performance Standards in

40 CFR 412 do not apply to facilities eligible for coverage under this permit. In addition, BCT has not been established for the Feedlots Point Source Category. BCT and BAT requirements are, therefore, established for facilities covered by this permit using best professional judgement. The requirements in this general permit are, with a few minor exceptions, the same as those in the model permit which is contained in Appendix B of the United Egg Producers Project XL Final Project Agreement.

Since New Source Performance Standards have not been established for EPO facilities eligible for coverage under this permit, neither new nor existing EPO facilities are “new sources”, because they do not meet the definition of “new source” as established in 40 CFR 122.2. EPA’s regulations at 40 CFR Part 6, Subpart F, which implement the national Environmental Policy Act of 1969 (NEPA), 42 U.S.C., 4331, et seq., provide the procedures for carrying out the NEPA environmental review process for the issuance of new source NPDES permits. Since the EPO facilities eligible for coverage under this general permit are not new sources, the NEPA environmental review process does not apply to the issuance of this general permit.

A. Best Conventional Pollutant Control Technology (BCT) and Best Available Technology Economically Achievable (BAT) Requirements

The following requirements are established as BCT/BAT for the EPO facilities covered by this permit using best professional judgement. These requirements are the same as established for BAT at 40 CFR 412, Subpart A.

There shall be no discharge of process wastewater pollutants to waters of the United States, except when chronic or catastrophic rainfall events cause an overflow of process wastewater from a facility properly designed, constructed, maintained, and operated to contain:

1. All process generated wastewater resulting from the operation of the EPO; plus,
2. All runoff from a 25 year, 24-hour rainfall event for the location of the EPO.

The requirement - “There shall be no discharge of process wastewater pollutants from retention or control structures to groundwater that has a direct hydrologic connection to waters of the United States.” - is also established as BCT/BAT using best professional judgement.

In addition, the best management practices requirement to develop and implement a Comprehensive Nutrient Management Plan (CNMP) (See Part III.B of the permit) is established as BCT/BAT using best professional judgement. The site-specific CNMP includes the following elements as appropriate to the needs and circumstances of the permitted EPO facility: animal outputs; manure handling and storage; land application of manure and wastewater; site management; recordkeeping; and other manure and/or wastewater utilization options.

The Management Practices requirements in Part III.C of the permit are also established as

BCT/BAT for EPO facilities using best professional judgement. These Practices requirements include: emergency discharge impact abatement, irrigation control, spills, liner requirements, chemical handling, discharges of chemicals to containment structures and facility closure.

C. Water Quality-Based Requirements

EPA is required under 40 CFR 122.44(d) to include any requirements necessary to achieve State water quality standards as established under section 303 of the Clean Water Act. The following requirements are established for this permit as necessary to achieve State water quality standards:

1. The requirement in Part II.A.1 of the permit which prohibits the discharge of process wastewater pollutants to waters of the United States during chronic rainfall events from a properly designed, constructed, maintained and operated facility.
2. The Special Conditions of Part III.A “Minimum Requirements to Protect Water Quality”. These Special Conditions include requirements addressing: buffers or equivalent practices, diversion of clean water, prevention of direct contact of animals with waters of the U.S., animal mortality, chemical disposal, proper operation and maintenance, record keeping and testing, maintaining proper storage capacity, and rates and timing of land application of manure and wastewater.
3. The requirement to develop and implement a CNMP.

V. Other Legal Requirements

A. State Certification

Under section 401(a)(1) of the Clean Water Act, EPA may not issue an NPDES permit until the State in which the discharge will originate grants or waives certification to ensure compliance with appropriate requirements of the Act and State law. Section 301(b)(1)(C) of the Act requires that NPDES permits contain conditions that ensure compliance with applicable state water quality standards or limitations. The proposed permit contains requirements intended to ensure compliance with state water quality standards and has been determined by EPA Region 6 to be consistent with the applicable state's water quality standards and the corresponding implementation plans. The Region has solicited certification from the States of New Mexico, Oklahoma, and the Pueblos of Acoma, Isleta, Nambe, Picuris, Pojoaque, Sandia, San Juan, Santa Clara, and Tesuque.

B. Endangered Species Act

EPA Region 6 has determined that issuance of this general permit is unlikely to adversely affect any threatened or endangered species or its critical habitat. EPA made this determination for the following reasons:

The permit specifically excludes operations having either continuous overflow watering or liquid manure handling. EPOs covered by this permit must comply with the permit requirements which include a prohibition on discharges of process wastewater pollutants except during catastrophic rainfall events from properly designed, constructed, maintained and operated facilities.

Discharges during chronic rainfall events are prohibited. These EPOs will also be subject to the numerous other requirements designed to assure proper operation of the animal confinement areas, storage facilities and unloading/handling areas of manure or egg wash water. Additionally, the permit requirements will assure that manure and wastewater is properly applied at an agronomic rate to minimize the contamination of rainwater falling on the land application site.

EPOs covered by this permit will be subject to the additional requirement to implement a multi-media environmental management system that controls a range of environmental impacts, including those not subject to regulation under the Clean Water Act, such as odor and pest control.

EPA is seeking written concurrence from the United States Fish and Wildlife Service on this determination.

C. Historic Preservation Act

Facilities which adversely affect properties listed or eligible for listing in the National Register of Historical Places are not authorized to discharge under this permit.

D. Economic Impact (Executive Order 12866)

Under Executive Order 12866 [58 FR 51735 (October 4, 1993)], the Agency must determine whether the regulatory action is “significant” and therefore subject to OMB review and the requirements of the Executive Order. The Order defines “significant regulatory action” as one that is likely to result in a rule that may have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. EPA has determined that this general permit is not a “significant regulatory action” under the terms of Executive Order 12866 and is therefore not subject to formal OMB review prior to proposal.

E. Paperwork Reduction Act

The information collection required by this permit has been approved by OMB under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, in submission made for the NPDES permit program and assigned OMB control numbers 2040-0086 (NPDES permit

application) and 2040-0004 (discharge monitoring reports).

F. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 USC 601 *et seq.*, requires that EPA prepare a regulatory flexibility analysis for regulations that have a significant impact on a substantial number of small entities. As discussed below, the permit being proposed to be reissued is not a “rule” subject to the Regulatory Flexibility Act. EPA prepared a regulatory flexibility analysis, however, on the promulgation of the Coastal Subcategory guidelines on which many of the permit’s effluent limitations are based. That analysis shows that compliance with the permit requirements will not result in a significant impact on dischargers, including small businesses, covered by these permits. EPA Region 6 therefore concludes that the permits proposed today will not have a significant impact on a substantial number of small entities.

G. Unfunded Mandates Reform Act

Section 201 of the Unfunded Mandates Reform Act (UMRA), P.L. 104-4, generally requires Federal agencies to assess the effects of their “regulatory actions” on State, local, and tribal governments and the private sector. UMRA uses the term “regulatory actions” to refer to regulations. (See, e.g., UMRA section 201, “Each agency shall . . . assess the effects of Federal regulatory actions . . . (other than to the extent that such regulations incorporate requirements specifically set forth in law)” (emphasis added)). UMRA section 102 defines “regulation” by reference to section 658 of Title 2 of the U.S. Code, which in turn defines “regulation” and “rule” by reference to section 601(2) of the Regulatory Flexibility Act (RFA). That section of the RFA defines “rule” as “any rule for which the agency publishes a notice of proposed rulemaking pursuant to section 553(b) of the Administrative Procedure Act (APA), or any other law. . .”

NPDES general permits are not “rules” under the APA and thus not subject to the APA requirement to publish a notice of proposed rulemaking. NPDES general permits are also not subject to such a requirement under the Clean Water Act (CWA). While EPA publishes a notice to solicit public comment on draft general permits, it does so pursuant to the CWA section 402(a) requirement to provide “an opportunity for a hearing.” Thus, NPDES general permits are not “rules” for RFA or UMRA purposes.

EPA thinks it is unlikely that this proposed permit issuance would contain a Federal requirement that might result in expenditures of \$100 million or more for State, local and tribal governments, in the aggregate, or the private sector in any one year. The Agency also believes that the proposed permit issuance would not significantly nor uniquely affect small governments. For UMRA purposes, “small governments” is defined by reference to the definition of “small governmental jurisdiction” under the RFA. (See UMRA section 102(1), referencing 2 U.S.C. 658, which references section 601(5) of the RFA.) “Small governmental jurisdiction” means governments of cities, counties, towns, etc., with a population of less than 50,000, unless the agency establishes an alternative definition. The proposed permit issuance also would not uniquely affect small governments because compliance with the proposed permit conditions

affects small governments in the same manner as any other entities seeking coverage under the permit.